TEO MING CHENG & 3 ORS.

v.

FINECO CONFECTIONERY INDUSTRIES (M) SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK J
[COMPANIES (WINDING-UP) NO. 28-64 OF 1995]
4 AUGUST 1995

BANKRUPTCY: *Winding-up - Application for appointment of a provisional liquidator - Section 231 Companies Act 1965 - Whether Court should exercise its discretion - Factors to be taken into account - Company unable to pay its debt - Whether sufficient grounds for a winding-up order.*

Fineco Confectionary Industries (M) Sdn. Bhd. (the company) was incorporated on 8 January 1993, but sustained losses, and ceased its business in June 1995. The petitioners were shareholders of the company and held 70% of the paid up share capital. By a petition dated 24 July 1995, the 1st petitioner sought to wind up the company on the sole ground that the company was unable to pay its debt. It was deposed by the 1st petitioner that to avoid the company's assets from being dissipated and scrambling amongst the creditors, a provisional liquidator should be appointed, who could take possession of all the assets and in due course apply to the Court for directions.

The issue for the Court was whether a provisional liquidator should be appointed by the Court.

Held:

[1] The appointment of a provisional liquidator is solely to maintain the *status quo* of the company. One ought not to be appointed unless there are special circumstances to warrant it. Though s. 231 of the Act confers an unfettered discretionary power on the Court to appoint a provisional liquidator, yet that power must be exercised in a proper judicial manner and there must be circumstances as envisaged in s. 218(1)(a) to (k) of the Act before the company may be wound up by the Court.

[2] The circumstances in which the company could not pay its debt will not extend to a situation where the company omits to pay its debt by reason of a genuine dispute. An omission of this nature does not amount to a neglect to comply with the statutory demand. A winding-up order will not be made on a debt which is disputed in good faith by the company. The dispute must be a genuine dispute and if that is established the petition may be dismissed or stayed.

[3] It is entirely at the Court's discretion to appoint a provisional liquidator. The urgency of a situation and the nagging fear of dissipation of assets are but some relevant factors, yet these factors may be decisive in ascertaining the propriety of appointing the provisional liquidator.

[Application allowed].

Cases referred to:

Re Union Accident Insurance Co. Ltd. [1972] 1 All ER 1105 ***(refd)***
Re Highfield Commodities Ltd. [1984] 3 All ER 884; [1985] 1 WLR 149 ***(refd)***
Re London and Paris Banking Corporation [1875] LR 19 Eq. 444 ***(refd)***
Cardiff Preserved Coal and Coke Co. v. Norton [1867] 2 Ch App. 405 ***(refd)***
Re Gold Hill Mines [1883] 23 Ch D 210 ***(refd)***
Re Brighton Club and Norfolk Hotel Co. Ltd. [1865] 35 Beav 204 ***(refd)***

Re London Wharfing and Warehousing Co. Ltd. [1865] 35 Beav 37 ***(refd)***
Re Lympne Investments Ltd. [1972] 2 All ER 385; [1972] 1 WLR 523 ***(refd)***
Re a Company (No. 003729 of 1982) [1984] 3 All ER 78; [1984] 1 WLR 1090 ***(refd)***
Re a Company [1985] BCLC 37 ***(refd)***
Re Imperial Hydropathic Hotel Co. Blackpool Ltd. [1882] 49 LT 147 ***(refd)***
Re RA Foulds Ltd. [1986] 2 BCC 99, 269 ***(refd)***
Stonegate Securities Ltd. v. Gregory [1980] Ch 576; [1980] 1 All ER 241 ***(refd)***
Re Club Mediterranean [1975] 11 SASR 481 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 8(5), 218, (1)(a) - (k), 231

Other sources referred to:
Palmer's Company Precedents, 17th Edn. part 2, at p. 101
The Principles of Modern Company Law, 3rd Edn. at p. 667

For the petitioners - Ong Ban Chai; M/s. Ong Ban Chai & Co.
For the official receiver - Rohalim bin Mat Arshad

JUDGMENT

Hj. Abdul Malik bin Hj. Ishak J:

The first petitioner by his petition dated 24 July 1995 sought to wind up Fineco Confectionery Industries (M) Sdn. Bhd. ("the company") under s. 218 of the Companies Act, 1965 ("the Act") particularly on the sole ground that the company was unable to pay its debt.

The events that led to the winding-up petition could be summarised in the following terms. The company was incorporated on 8 January, 1993 under the Act and had its registered office at number 1702A, 17th Floor, Holiday Plaza, Century Garden, 80250 Johor Bahru. As a limited company it had an authorised capital of RM2,000,000 divided into 2,000,000 shares at RM1 each. The paid up capital of the company or at least the credited paid up sum was RM400,000. The company was established:

> to carry on the business as manufacturers, importers, exporters, distributors, wholesalers, retailers of and dealers in chocolates, biscuits, cakes, snacks, confectionery, compounds and edible products of all kinds and descriptions; and all other objects set forth in the memorandum of association thereof.

Indeed a business venture which was both laudable and ambitious. The petitioners as shareholders of the company held 70% of the paid up share capital in the following proportions:

(a) Teo Ming Cheng	40,000	shares;
(b) Chou Chin Yang	120,000	shares
(c) Piter Kornelius	60,000	shares; and
(d) Mulia Kusumo	60,000	shares.

Somehow by a stroke of misfortune, the company sustained losses and the directors failed to produce audited accounts for the past two years. The company ceased business since June 1995.

From the affidavit of the first petitioner affirmed on 24 July, 1995, it was deposed that to avoid the company's assets from dissipating and scrambling amongst the creditors, a provisional liquidator should be appointed. Once that is done, the provisional liquidator

can take possession af all the assets and in due course apply to the Court for directions. The first petitioner further deposed that the appointment of a provisional liquidator would prevent multiplicity of Court proceedings and inevitably it would save judicial time and costs.

The source of statutory power vested in the Court to appoint a provisional liquidator is set out in s. 231 of the Act which reads as follows:

> The Court may appoint the Official Receiver or an approved liquidator provisionally at any time after the presentation of a winding up petition and before the making of a winding up order and the provisional liquidator shall have and may exercise all the functions and powers of a liquidator subject to such limitations and restrictions as may be prescribed by the rules or as the Court may specify in the order appointing him.

From a plain reading of s. 231 of the Act, the Court can exercise its power at any time after the presentation of a winding-up petition and before the making of a winding-up order to appoint a provisional liquidator.

It is now trite that the appointment of a provisional liquidator is solely to maintain the *status quo* of the company and such an appointment would be made easier if the petition is unopposed. It is said that a provisional liquidator ought not to be appointed unless there are special circumstances to warrant it and what amounts to special circumstances is explained by Plowman J in *Re Union Accident Insurance Co. Ltd.* [1972] 1 All ER 1105 where his Lordship quoted a passage from *Palmer's Company Precedents*, 17th Edn., part 2, at p. 101 which reads as follows:

> The application to appoint a provisional liquidator is by r. 8 made to the Registrar by summons. The application should be supported by an affidavit as to the circumstances which render the appointment desirable, and, where any person other than the Official Receiver is to be appointed, as to the special fitness of the proposed provisional liquidator. If the company makes, consents to, or is shown not to oppose, the application, the appointment is almost a matter of course when it is asked that the official receiver may be appointed. The early cases seem to show that the appointment would only be made where the petition was unopposed. But where the company opposes, or does not appear, the order may now be made, if there are special circumstances such as danger to the assets, or obvious insolvency, or the company has admitted that it has no defence to the petition.

Plowman J in the same case was also of the view that the duty of the provisional liquidator there was to protect the company's assets and a reduction of the company's assets said to be correlative of the protection of its assets. In fact, Mr. Ong Ban Chai, the learned Counsel for the first petitioner, moulded his case along these lines and it was the plank of his contentions that the provisional liquidator take possession, control and protect the assets or realise the assets of the company and that such assets ought not to be distributed or parted with until further order.

Though s. 231 of the Act confers an unfettered discretionary power on the Court to appoint a provisional liquidator, yet that power must be exercised in a proper judicial manner *(Re Highfield Commodities Ltd.* [1984] 3 All ER 884; [1985] 1 WLR 149) and there must be circumstances as envisaged in s. 218(1)(a) to (k) of the Act before the company may be wound up by the Court. For convenience, these circumstances merit reproduction:

(a) the company has by special resolution resolved that it be wound up by the Court;

(b) default is made by the company in lodging the statutory report or in holding the statutory meeting;

(c) the company does not commence business within a year from its incorporation or suspends its business for a whole year;

(d) the number of members is reduced in the case of a company (other than a company the whole of the issued shares in which are held by a holding company) below two;

(e) the company is unable to pay its debts;

(f) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members;

(g) an inspector appointed under Part IX has reported that he is of opinion -

(i) that the company cannot pay its debts and should be wound up; or

(ii) that it is in the interests of the public or the shareholders or of the creditors that the company should be wound up;

(h) when the period, if any, fixed for the duration of the company by the memorandum or articles expires or the event, if any, occurs on the occurrence of which the memorandum or articles provide that the company is to be dissolved;

(i) the Court is of opinion that it is just and equitable that the company be wound up;

(j) the company has held a licence under the Banking Act, 1973 or the Islamic Banking Act, 1983, and that licence has been revoked or has expired and has not been renewed;

(k) the company has carried on banking business in Malaysia in contravention of ss. 3, 5 or 6 of the Banking Act, 1973.

The circumstances in which the company could not pay its debt are manifold. It will not, however, extend to a situation where the company omits to pay its debt by reason of a genuine dispute. An omission of this nature does not amount to a neglect to comply with the statutory demand *(Re London and Paris Banking Corporation* [1875] LR 19 Eq. 444). *Cardiff Preserved Coal and Coke Co. v. Norton* [1867] 2 Ch App. 405 at p. 410 lays down the principle that a demand in excess of what is due is a valid statutory demand. It is pertinent to mention that a winding-up order will not be made on a debt which is disputed in good faith by the company *(Re Gold Hill Mines* [1883] 23 Ch D 210, CA; *Re Brighton Club and Norfolk Hotel Co. Ltd. [1865]* 35 Beav 204; *Re London Wharfing and Warehousing Co. Ltd.* [1865] 35 Beav 37; *Re Lympne Investwents Ltd.* [1972] 2 All ER 385; [1972] 1 WLR 523; *Re a Company (No. 003729 of 1982)* [1984] 3 All ER 78; [1984] 1 WLR 1090; and *Re a Company* [1985] BCLC 37. The Court must always be vigilant in a winding-up petition to see that the dispute is based on a substantial ground (*Re Imperial Hydropathic Hotel Co. Blackpool Ltd.* [1882] 49 LT 147, CA). But, I hasten to add a warning that a dispute as to the precise amount due is not a sufficient answer to the petition (*Re RA Foulds Ltd.* [1986] 2 BCC 99, 269. The dispute must be a genuine dispute and if that is established the petition may be dismissed or stayed (*Re Gold Hill Mines (supra)*) and even an injunction may be granted restraining the advertisment or publicising of the petition. On the other hand of the scale, where a petition has not been presented but is threatened in respect of a disputed debt, an injunction may be granted restraining the presentation (*Stonegate Securities Ltd. v. Gregory* [1980] Ch 576; [1980] 1 All ER 241, CA).

There are two main types of winding-up under the Act. Division 2 of the Act speaks of winding-up by the Court whereas Division 3, of the Act relates to voluntary winding-up. Both methods of winding-up would put an end to the company and are certainly distasteful. L.C.B Gower in his book entitled *The Principles of Modern Company Law*, 3rd Edn. at p. 667 in erudite terms described liquidation as:

> At the worst, liquidation is like the extraction of a tooth - it puts an end to the victim's agony and may even enable him to bite back. But it cannot guarantee him a square meal, and may be painful at the time, particularly if the operation is delayed too long.

On the brighter side, an order for winding-up a company operates in favour of all the creditors and I venture to say that it may even be in favour of all the contributories of the company provided the winding-up was made on the joint petition of a creditor and a contributory .

Now, reverting back to the present case in so far as the appointment of a provisional liquidator is concerned, it is entirely at the Court's discretion. The urgency of the situation and the nagging fear of dissipation of assets are but some relevant factors, yet these factors may be decisive in ascertaining the propriety of appointing the provisional liquidator. It is not easy to compile an exhaustive list as was attempted by Bright J in *Re Club Mediterranean* [1975] 11 SASR 481 and I am not about to do it. The complexity of the commercial world would surely pose tremendous pressure in preparing an exhaustive list. Be that as it may, the first respondent sought for the following prayers, namely, the appointment of Mr. Soon Teck Kuan, an approved liquidator under s. 8(5) of the Act, as a provisional liquidator of the company and that provisional liquidator was to take possession, control and protect the assets or realise the assets of the company and such assets were not supposed to be distributed or parted with until further order. I acceded to these prayers. Incidentally, the particulars of the properties within the control of the provisional liquidator were itemised in encl. 5 as follows:

(i) machineries and movable properties found in the factory at No. 5, Jalan Masyhur 5, Taman Perindustrian Cemerlang, 81800 Ulu Tiram, Negeri Jobor Darul Ta'zim;

(ii) monies in the bank account standing in the credit of the respondent; and

(iii) outstanding sums due by the debtors.

In addition to that, there was also a prayer that the costs of the first petitioner's application be taxed and paid to the first petitioner out of the assets of the company. I too acceded to this prayer. All in all, I granted the prayers sought for in paras (a), (b)(i), (ii) and (iii), and (c) of encl. 5.